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Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
Committee on Commerce,
Science & Transportation
United States Senate
227 Hart Senate Office Building
Washington, D.C. 20510

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Dear Chairman Inouye:

Thank you for your letter regarding implementation of the rate regulation and programming access provisions of the Cable Television Consumer Protection and Competition Act of 1992.

The 1992 Cable Act adds new Section 623 to the Communications Act, which provides for regulation of basic and cable programming services. In its Report and Order and Further Notice of Proposed Rulemaking, adopted April 1, 1993, the Commission adopted regulations to implement Section 623. The 1992 Cable Act also adds new Section 628 to the Communications Act to prohibit unfair or discriminatory practices in the sale of video programming. The stated intent of this provision is to foster the development of competition

the Commission has adopted standards for regulation of equipment used with basic cable and cable programming services based on the actual cost of such equipment.

With respect to the program access provisions of Section 19 of the 1992 Cable Act, your letter states your belief that price differentials are per se discriminatory unless they come within the allowances specified in Section 628(c)(2)(B). The Commission concludes in the First Report and Order that price discrimination will be deemed to occur if the difference in the prices charged to competing distributors is not explained by the factors set forth in the statute, which generally involve (1) cost differences at the wholesale level in providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability and character; and (4) differences in the way the programming service is offered. The Commission concluded that these factors will permit sufficient latitude for legitimate and justifiable pricing practices common to a dynamic and competitive marketplace.

You also submit that no independent showing of harm is necessary in discrimination cases. The Commission concludes in the First Report and Order that complainants alleging violations of specific prohibitions of Section 628 regarding discrimination, exclusive contracts or undue influence will not be required to make a threshold showing of harm. The Commission states its belief that Congress has already determined that such violations result in harm. The Commission also holds, however, that the plain language of the statute requires complaints filed pursuant to the general prohibitions of Section 628(b) regarding unspecified unfair practices must demonstrate that an alleged violation had the purpose or effect of hindering significantly or preventing the complainant from providing programming to subscribers or consumers.

You additionally assert that Section 628 intends that after establishment of a prima facie case of discrimination by the complainant, the integrated programmer or cable operator has the burden of proof in defending its actions. The First Report and Order adopts a streamlined complaint process. The Commission's rules will encourage programmers to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a programmer declines to provide such information, it will be sufficient for a distributor to submit a sworn complaint alleging, based upon information and belief, that an impermissible price differential exists. The burden will be placed on the programmer to refute the charge by presenting evidence of the actual price differential and its justifications for that differential. The complaining distributor will then have an opportunity to reply.

With respect to exclusive contracts, you contend that such contracts are not permitted by the statute except on a case-by-case finding by the Commission that a particular contract is in the public interest, as defined by the

~~Article 1. The Direct Demand and Order determines that~~



United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

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The Honorable James Quello
March 10 1993

The Honorable James Quello
March 19, 1993
Page Three

of the four specific exemptions set out in the statute itself. Under the Act, after a complainant makes its prima facie case, the burden of proof lies with the vertically integrated cable programmer or cable operator that is alleged to be in violation. The statute does not grant the Commission the discretion to choose any other method of analysis of price discrimination or the ability to shift the burden of proof to cable's potential competitors.

Another example of the Notice's failure to recognize the statutory mandate is the FCC's proposal to create a safe harbor for exclusive contracts for new programming. Under the Act, the only instance in which an exclusive contract is permitted is upon a Commission finding that such an arrangement in an area served by cable is in the public interest, as determined by factors specified in the statute. There is no language to suggest that this very limited exception permits a blanket waiver of the statute's requirement of a case-by-case determination of the public interest. In fact, such a blanket waiver would undermine the Act's fundamental goal of promoting greater availability of programming to multiple video distributors and are inconsistent with the intent of the Act.

The above examples are illustrative, not exhaustive. The program access provisions were among the most intensely examined and vigorously debated aspects of the Cable Act. The resulting directives in the Act are clear.

Recent actions by some cable operators seem to demonstrate an intent to thwart the provisions of the Act. Therefore, your leadership at the Commission is needed now to ensure that the letter and spirit of the law are followed and the goals of the Act to protect consumers and encourage competition are fulfilled. We appreciate your attention to our concerns.


JOHN C. DANFORTH
Ranking Republican

Sincerely,


ERNEST F. HOLLINGS
Chairman


DANIEL K. INOUÉ
Chairman
Communications Subcommittee